RECORD AND BRIEFS

No. 16-498

IN THE

Supreme Court of the United States

DAVID PATCHAK,

Petitioner,

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JOHN DOSSETT
JACOB SCHELLINGER
NATIONAL CONGRESS OF AMERICAN INDIANS
Embassy of Tribal Nations
1516 P St., N.W.
Washington, D.C. 20005
(202) 466-7767
john_dossett@ncai.org

ETHAN G. SHENKMAN
Counsel of Record
R. STANTON JONES
EMILY N. DILLINGHAM
JONATHAN L. KOENIG
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 942-5000
ethan.shenkman@apks.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The National Congress of American Indians ("NCAI") submits this brief as amicus curiae in support of Respondents' position that the Court should affirm the judgment below in *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016). As the oldest and largest national organization addressing American Indian interests, NCAI currently represents more than 250 tribes and Alaska native villages, reflecting a cross-section of tribal governments with broadly varying land bases, economies, and histories. Since 1944, NCAI has advised tribal, federal, and state governments on a wide range of Indian issues, including the federal trust-acquisition policies relevant to this suit.

Amicus is in a unique position to articulate the vital role that trust land acquisition plays in the welfare of Indian tribes and Indian communities, which provides critical context in discerning Congress' intent behind the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014) (the "Gun Lake Act"). In particular, Amicus will explain how rising concerns over the uncertainty and lack of finality that had been injected into the trust acquisition process motivated the case-by-case confirmation of trust land status in this and similar cases. Congress was, in effect, responding to this Court's invitation in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v.*

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[1] In accord with Supreme Court Rule 37.6, NCAI affirms that no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of NCAI's intention to file this amicus brief under this Rule, and consent to file was granted by all parties. Letters reflecting the parties' consent have been filed with the Clerk.

Patchak, 567 U.S. 209 (2012) ("*Patchak I*"), to step in and restore the federal government's sovereign immunity, and hence the certainty and finality in fee-to-trust transactions, necessary for tribal governments to make productive use of their trust lands, consistent with federal policies of tribal self-government and economic self-sufficiency embodied in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq*.

SUMMARY OF ARGUMENT

Land held in trust by the United States for the benefit of Indian tribes plays a critical role in tribal self-government and economic development. Trust lands support all aspects of tribal life, from the provision of government and health care services to the protection of natural resources to energy development.

Congress considered and enacted the Gun Lake Act in 2014, against the backdrop of critical developments in the trust land acquisition process. As Congress was well aware, this Court's decisions in both *Carcieri v. Salazar*, 555 U.S. 379 (2009), and *Patchak I* resulted in a wave of litigation introducing a new degree of uncertainty and lack of finality into that process. Those developments are exemplified by *Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015), in which litigants used the *Carcieri* and *Patchak I* decisions as tools with which to re-open a land transfer that the government had finalized decades earlier, thereby undermining finality and repose.

When construed in this full context, the Gun Lake Act is best understood as a simple and straightforward response by Congress to this Court's invitation in *Carcieri* and *Patchak I* to restore certainty to the trust land acquisition process. In enacting the Gun Lake

Act, Congress affirmed the trust status of, and restored the sovereign immunity of the United States with respect to, one parcel of land for the Gun Lake Tribe, and it acted well within its authority in doing so. This Court therefore should affirm the judgment of the court of appeals.

ARGUMENT

I. TRUST-LAND ACQUISITIONS ARE CRITICAL TO RESTORING TRIBAL HOMELANDS AND SUPPORTING TRIBAL ECONOMIC DEVELOPMENT, SELF-GOVERNMENT, AND SELF-DETERMINATION.

A. The Purpose of IRA Section 5 Is to Restore and Protect Tribal Homelands.

1. Trust-Land Acquisitions Are Necessary to Repair the Fragmentation of Removal and Allotment Policies.

In 1934, Congress enacted the IRA, including the trust land acquisition provisions in Section 5, in an effort to reverse the deleterious effects of federal Indian policies during the previous century, which had decimated tribal land holdings and devastated tribal communities. 25 U.S.C. § 465; *see generally* General Allotment Act, ch. 119, 24 Stat. 388 (1887). "The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 73-1804, at 6 (1934)).

One of the core functions of the IRA is to address the enormous loss of Indian land holdings that occurred as a result of the federal government's allotment and

assimilation policies, whereby the government allotted parcels to individual Indians and opened surplus lands for homesteading by non-Indians, thereby enabling the alienation from tribal control of lands that had been previously set aside for perpetual Indian use. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-257 (1992); Charles Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, 19-21 (1987). During the allotment era, from approximately 1887 to 1933, roughly 90 million acres of tribal land were removed from tribal occupancy and ownership through allotment. *Id.*; *see also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 436 n.1 (1989). In addition to the 90 million acres lost through allotment, 60 million acres of tribal land were lost through outright cession or sale to non-Indian homesteaders and corporations, bringing the total amount of alienated land to 150 million acres. *Cohen's Handbook of Federal Indian Law* § 1.04 (Nell Jessup Newton, ed., 2012) ("*Cohen*").[2]

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[2] As a result, many Indian reservations became "checkerboards" of interspersed tribal and non-tribal parcels, individual allotments became fractionalized over successive generations of Indian and non-Indian ownership, and an influx of non-Indians formed homesteads on and otherwise occupied vast areas of former tribal lands and reservations. *See generally* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 Idaho L. Rev. 519, 522-23 (2013). As then-Judge Gorsuch observed, "checkerboard jurisdiction [became] a fact of daily life throughout the West." *Ute Indian Tribe of the Uintah v. Myton*, 835 F.3d 1255, 1262 (10th Cir. 2016), *cert. dismissed*, 137 S. Ct. 2328 (2017).

Well before the allotment era, tribal homelands were also devastated by federal removal policies, through which the United States government pursued massive forced migrations of whole populations of Indians from their ancestral lands to remote corners of the western territories thought to be less desirable for homesteading and development. *See generally* Charles E. Cleland, *Rites of Conquest: The History and Culture of Michigan's Native Americans* ("*Rites of Conquest*"), at 199-201 (1992). There was a concerted effort during the mid-nineteenth century, for example, to remove the Pottawatomi Indian Tribes and other Indian populations based in Michigan and around the Great Lakes to areas in present-day Kansas and Oklahoma. *See* R. David Edmunds, *The Pottawatomis, Keepers of the Fire*, at 240-42 (1939); Charles E. Cleland, Michigan State University, *A Brief History of Michigan Indians*, at 24 (1975); *Rites of Conquest*, at 198-230.

As relevant to this case, not all of the Indians were successfully removed and relocated. *See* Edmunds, at 268-70, 273-75; *Rites of Conquest*, at 225 ("The number of Pottawatomi who were actually removed is unknown. Many simply hid out until the removal fervor subsided."); J.A. at 54, 161-62. Certain bands of Pottawatomi, for example, remained associated with their ancestral lands in Michigan, having managed to avoid removal, escape from forced marches, or return from exile. Edmunds, at 268-70; *Rites of Conquest*, at 224-25, 234-44.

Many of the Indians who remained in or returned to Michigan after removal were landless or scattered among small colonies or other minor landholdings. The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Gun Lake Tribe" or "Tribe") followed this

trajectory. The United States entered into more than a dozen treaties with the Tribe from 1795 to 1855. J.A. at 53-54. Yet, by the 1850s, as the United States pursued the wholescale removal of thousands of Pottawatomi from Michigan, the Tribe was ultimately divested of its treaty lands. J.A. at 54, 161-62. Members of the Tribe remained in Michigan after removal, occupying a diminutive parcel of land in Allegan County, Michigan, referred to as the Griswold Indian Colony and later as the Bradley Settlement. J.A. at 86. Although deprived of its broader ancestral homelands, the Tribe maintained its character, nationhood, culture, and community, clinging to this outpost in Michigan—one of the areas where the Tribe continues to exist today. J.A., at 161-62.

Thus, the trust acquisition process under the IRA is as relevant for tribes whose land holdings were decimated by removal as it is for tribes whose reservation lands were scattered and diminished through later policies of allotment and assimilation.

2. In Enacting Section 5 of the IRA, Congress Recognized the Importance of Restoring Tribal Land Bases.

Section 5 of the IRA authorizes the Secretary "in his discretion" to acquire "any interest in lands, water rights, or surface rights to lands within or without existing Indian reservations" through purchase, gift, or exchange "for the purpose of providing land for Indians." 25 U.S.C. § 465. Authorizing the federal government to take land into trust for the benefit of tribes is the cornerstone of the Act's efforts to restore and stabilize tribal land bases in order to promote tribal economic, cultural, and civic self-sufficiency. The "essential and basic features" of the IRA are "[l]and reform and in [sic] a measure home rule," 78

Cong. Rec. 11,729 (1934), with the purpose of safeguarding "security of the Indian lands," and "developing as rapidly as possible Indian use of Indian lands for self-support," *id.* at 11,730. The ultimate goal is "to make the Indians, as a group, self-supporting . . . ." *Id.* at 11,732. Despite the well-recognized need to restore tribal homelands through the trust acquisition process, in the decades since 1934, tribes have re-acquired only around 10 million of the 150 million acres of tribal lands lost before the enactment of the IRA. Opening Statement of Hon. Maria Cantwell, Chairman of the Committee on Indian Affairs, S. Hrg. 113-214, at 1-3 (Nov. 20, 2013).

The Department of Interior has recognized the "critical role" played by "the fee to trust process as a means to restore and bolster self-determination and sovereignty in Indian country." Statement of James Cason, Acting Deputy Secretary of the Interior, Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act (July 13, 2017), https://www.doi.gov/ocl/trust-land-acquisition. As explained in recent testimony by the Department:

> The benefits to tribes are twofold. First, restoration of tribal land bases reconnects fractionated interests and provides protections for important tribal cultures, traditions, and histories. Second, the connectivity that occurs when land is placed into trust enables tribes to foster economic potential. From energy development to agriculture, trust acquisitions provide tribes the flexibility to negotiate leases, create business opportuni-

> ties, and identify the best possible means to use and sell available natural resources.

Id.

Trust-land acquisitions support the full panoply of tribal life.[3] As explained by the former Assistant Secretary for Indian Affairs, tribes use the acquisitions to sustain all aspects of self-government and social continuity:

> [T]he largest number of land into trust applications is for agriculture. The second most is for infrastructure, such as health care facilities, schools and police stations and those sorts of things. Third, for economic development, but not including gaming . . . . gaming is really the small exception that ends up having a great deal of public attention, but it does not represent the heartland of land into trust in any way.

Statement of Hon. Kevin Washburn, Assistant Secretary, Indian Affairs, U.S. Department of the Interior, *Committee on Indian Affairs*, S. Hrg. 113-214, at 9 (Nov. 20, 2013).

3. Land Is Taken into Trust Under IRA Section 5 Through a Deliberative Process, with Substantial Opportunity for Input by States and Interested Stakeholders.

The Department of Interior's implementing regulations for the fee-to-trust process provide the standards that guide trust-land acquisitions. *See* 25 C.F.R. Part 151. The process begins when a tribe files a fee-

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[3] *See* discussion in Section I.C, *infra*.

to-trust application with the Bureau of Indian Affairs ("BIA"). The application must include a description of the land, the intended use, and the reason the applicant is requesting the land be placed into trust. Dep't of Interior, Bureau of Indian Affairs, *Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook)*, Version IV (revised June 28, 2016). Depending on whether the land is on-reservation or off-reservation, different standards apply. *See* 25 C.F.R. § 151.10 (on-reservation acquisitions); 25 C.F.R. § 151.11 (off-reservation acquisitions).

The Department of the Interior recognizes that trust acquisitions may raise concerns by local and state governments, and therefore specifically solicits comments from such bodies regarding the impact trust acquisitions may have on their tax bases and jurisdiction. *See* 25 C.F.R. §§ 151.10, 151.11. In addition, discretionary trust-land acquisitions require review under the National Environmental Policy Act ("NEPA"), which provides a further opportunity for stakeholders to provide input in the fee-to-trust process. *See, e.g.*, 40 C.F.R. § 1501.7(1) (requiring agencies to "invite the participation of affected Federal, State, and local agencies . . . and other interested persons"); Dep't of Interior, Bureau of Indian Affairs, *Fee-to-Trust Handbook*, at 18 ("NEPA compliance for every discretionary fee-to-trust transaction must be documented").

The Secretary bases the decision to acquire land into trust after carefully evaluating, on the record, the criteria set forth in the regulations, including (among others) the "need of the...tribe for additional land," the "purposes for which the land will be used," the "impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," and

any "[j]urisdictional problems and potential conflicts of land use . . . ." *See* 25 C.F.R. § 151.10(b), (c), (e), (f); § 151.11(a). All final fee-to-trust decisions are ultimately subject to judicial review under the Administrative Procedure Act ("APA"). *See Patchak I*, at 224.

B. Trust-Land Acquisitions Support Tribal Economic Development, Self-Government, and Self-Determination.

Tribes utilize trust land to support economic development, exercise self-government, and promote self-determination. In contrast, tribes lacking adequate land bases may struggle to fully realize these goals.

1. Trust-Land Supports Tribal Economic Development, Which Results in Improved Socioeconomic Conditions.

Indian communities remain among the most economically disadvantaged groups in the United States. In 2015, the poverty rate among American Indians and Alaska Natives was 26.6%, the highest rate of any group, compared with 14.7% among the population as a whole. *See* United States Census Bureau, *Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native Heritage Month: November 2016*, https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2016/cb26-ff22_aian.pdf.[4]

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[4] Relatedly, Indian communities suffer from some of the highest rates in the nation for unemployment, high school drop outs, alcohol and substance abuse, and domestic violence. *See* Randall K.Q. Akee & Jonathan B. Taylor, *Social and Economic Change on American Indian Reservations, A Databook of the US Censuses and the American Community Survey 1990-2010*, at 15, 44, 57(2014); Steven W. Perry, Washington, DC: US Department of Justice, Bureau of Justice Statistics, *A BJS Statistical Profile,*

It is well-recognized that "[h]aving a land base is essential for many tribal economic development activities." U.S. Government Accountability Office, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands*, GAO-11-543T, 5 (Apr. 7, 2011). "Trust acquisition of land . . . helps generate revenues for public purposes, and helps protect tribal culture and ways of life (*e.g.*, housing for tribal citizens, energy and natural resource development, protections for subsistence hunting and agriculture)." Department of the Interior, Bureau of Indian Affairs, *Land Acquisitions: Appeals of Land Acquisition Decisions*, 78 Fed. Reg. 67928, 67929 (November 13, 2013).

Trust status—as opposed to mere fee ownership—is crucial because transferring land into trust places it under primary tribal and federal jurisdiction. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991); *Cohen*, § 15.07[1][a], at 1010. This jurisdictional status protects the land from state and local taxation, 25 U.S.C. § 465, and carries with it several other features that make trust land attractive to investors.[5]

1992-2002 [NCJ203097], American Indians and Crime (December 2004), https://www.bjs.gov/content/pub/pdf/aic02.pdf.

[5] For one, fee-to-trust can avoid the consequences of double taxation by both state and tribal governments, which "would discourage economic growth." *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2044, 188 L. Ed. 2d 1071 (2014) (Sotomayor, J., concurring). Congress and many tribes have encouraged economic growth by establishing various tax-incentives to spur development in Indian country. *See Cohen*, § 21.01, at 1280; § 8.02[3], at 689-90; § 21.02[4], at 1288. Tribes also attract investment by establishing more efficient land-use regulations or permit requirements tailored to local needs. *See* Julian

Indeed, successful tribal economic development depends in large part on the presence of stable legal infrastructure and institutions that trust land promotes, as well as vesting of decision-making authority in those most affected by economic decisions—the tribes themselves. *See* Stephen Cornell & Miriam Jorgensen, NCAI Policy Research Ctr., *The Nature and Components of Economic Development in Indian Country*, 10-13 (May 1, 2007) (successful economic development "begins with jurisdiction" and relies on subsequent development of "governance infrastructure"). As the degree of "tribal sovereignty rises, so do the chances of successful development." Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, at 15-16 (Native Nations Inst. & Harvard Project on Am. Indian Econ. Dev., Joint Occasional Papers on Native Affairs, No. 2003-02 (Jan. 2003).

For these reasons, investigators have concluded that further socioeconomic improvement in Indian country will depend in part on continued acquisition of trust lands. As tribes "invest[] heavily" in such things as police departments, state-of-the-art health clinics, water treatment plants, and other infrastructure that supports tribal self-governance, tribes can make "striking" socioeconomic gains. Jonathan B. Taylor & Joseph P. Kalt, Harvard Project on Am. Indian Econ. Dev., *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses*, at vii, ix-xi (Jan. 2005).

Schreibman, *Developments in Policy: Federal Indian Law*, 14 YALE L. & POL'Y REV. 353, 384 (1996).

2. As Congress Recognized, State and Local Governments and Neighboring Communities Also Benefit from Trust Acquisitions.

Tribal economic development provides revenue for the broader non-Indian community as well. Tribal governments and reservation businesses, for example, separately account for billions of dollars in off-reservation spending. Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 604 (2004). In addition, tribal-state revenue sharing agreements and other voluntary intergovernmental service agreements provide millions of dollars in revenue to state and local government coffers. Further, continued improvements in tribes' socioeconomic conditions decrease social service costs for all levels of government. *See* Schreibman, 14 YALE L. & POL'Y REV. at 380.[6]

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[6] The Gun Lake Tribe has provided over $93 million to state and local governments pursuant to revenue sharing agreements since the opening of its gaming facility in 2011. *See Spring Revenue Sharing Payments Surpass $6.7 Million*, Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, http://mbpi.org/spring-revenue-sharing-payments-surpass-6-7-million (last visited Sept. 14, 2017); *see also Tribal Contributions from Gaming Revenue to the State, Cities, Towns & Counties as of August 18, 2017*, Arizona Dep't of Gaming, https://gaming.az.gov/sites/default/files/documents/files/Cumulative%20TC%20amts%20-%20States%20FY2018%20-%201st%20QTR%20.pdf (reporting over $90 million contributed in fiscal year 2016 and over $1.1 billion since contributions began in 2004); Schreibman, 14 YALE L. & POL'Y REV. at 380-81.

C. Examples of Beneficial Uses of Lands Held in Trust-Land for Indian Tribes.

The size, scope, and type of developments occurring on trust land vary greatly. *See, e.g.*, U.S. Gov't Accountability Office, GAO-06-781, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, 45-49 (July 2006). Below are recent examples of how tribes have made use of trust lands to benefit their people and surrounding communities.

1. Government Operations and Services.

Among the most important uses of trust lands is the support of tribal government institutions and services. Trust-land acquisitions are crucial to permitting tribes to operate their governments under their own sovereign control, free from intrusion of state or local jurisdictions.

- The Poarch Band of Creek Indians in Alabama, for example, utilizes trust land to house its tribal headquarters, health clinic, and police department.[7]

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[7] *History of the Poarch Band of Creek Indians*, The Poarch Band of Creek Indians, http://pci-nsn.gov/westminster/tribal_history.html (last visited Sept. 14, 2017); *Tribal Government Structure*, The Poarch Band of Creek Indians, http://pci-nsn.gov/westminster/governmen[illegible]html (last visited Sept. 14, 2017); *Tribal Health Department*, The Poarch Band of Creek Indians, http://pci-nsn.gov/westmi[illegible]ster/tribal_health.html (last visited Sept. 14, 2017); *Public Safety*, The Poarch Band of Creek Indians, http://pci-nsn.gov/westminster/public_safety.html (last visited Sept. 14, 2017).

- The Keweenaw Bay Indian Community in Michigan operates its tribal government center, cultural center, police department headquarters, community college, early childhood care center, and two FCC-licensed radio stations on trust lands.[8]
- The Jamestown S'Klallam Tribe in Washington operates a fire station on recently acquired trust land, which provides emergency services for all residents of the county.[9]
- The Oglala Sioux Tribe in South Dakota is utilizing 230,000 acres of recently acquired trust land to support a major housing development on the Pine Ridge Reservation.[10]

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[8] *Tribal Enterprises*, Keweenaw Bay Indian Community, http://www.kbic-nsn.gov/content/tribal-enterprises; *Tribal Police*, Keweenaw Bay Indian Community, http://www.kbic-nsn.gov/content/tribal-police (last visited Sept. 14, 2017); *Tribal Historic Preservation Office*, Keweenaw Bay Indian Community, http://www.kbic-nsn.gov/content/tribal-historic-preservation-office (last visited Sept. 14, 2017); *About Us*, Keweenaw Bay Ojibwa Community College, https://www.kbocc.edu/about-us/ (last visited Sept. 14, 2017); *Child Care Center*, Keweenaw Bay Ojibwa Community College https://www.kbocc.edu/child-care-center/ (last visited Sept. 14, 2017); *Keweenaw Bay Indian Community*, Copper Country, http://www.coppercountry.com/KBIC.php (last visited Sept. 14, 2017).

[9] *Firehouse Blessing Grand Opening*, The Poarch Band of Creek Indians, http://www.jamestowntribe.org/event/firestation/firehouseblessing.htm (last visited Sept. 14, 2017); *Jamestown S'Klallam History*, Jamestown S'Klallam Tribe, http://www.jamestowntribe.org/history/hist_jst.htm (last visited Sept.14, 2017).

[10] U.S. Department of the Interior, Status Report, *Land Buy-Back Program for Tribal Nations* (Nov. 20, 2014) https://

2. Health Care.

Health care facilities and services are another important use of tribal trust land. Tribes frequently utilize trust land to develop tribal health care centers, which often provide services and employment opportunities in rural areas in which health-care services are otherwise severely limited. Many tribal health-care facilities provide much-needed health-care services to nearby non-member residents as well.

- The Confederated Tribes of Grand Ronde operate the Grand Ronde Health and Wellness Center on trust land on the tribes' reservation in rural Oregon, providing services to both Indian and non-Indian patients.[11]
- Similarly, the Reno-Sparks Indian Colony of Nevada utilizes recently acquired trust land to support the tribally owned and operated Reno-Sparks Tribal Health Center, which provides health care services to tribal members and Washoe County urban Indians.[12]

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www.doi.gov/sites/doi.gov/files/migrated/news/upload/Buy-Back ProgramStatusReport-11-20-14-v4.pdf.

[11] *Health and Wellness*, The Confederated Tribes of Grande Ronde, https://www.grandronde.org/departments/health-and-wellness/ (last visited Sept. 14, 2017).

[12] *Reno Sparks Tribal Health Center*, Reno-Sparks Indian Colony, http://www.rsic.org/rsic-services/reno-sparks-tribal-health-center/ (last visited Sept. 14, 2017); Statement of James Cason, Acting Deputy Secretary of the Interior, Comparing 21st Century Trust Land Acquisition With the Intent of The 73rd Congress in Section 5 of The Indian Reorganization Act (July 3, 2017), https://www.doi.gov/ocl/trust-land-acquisition (last visited Sept. 14, 2017).

3. Natural Resources Management and Protection.

Tribes utilize trust-land acquisitions for protection of natural resources and the environment. Taking land into trust allows tribes to determine for themselves how best to manage and utilize their natural resources for the benefit of their people, and to preserve their cultural resources in order to maintain their traditional lifeways.

- The Pueblo of Isleta utilizes over 90,000 acres of recently acquired trust land in New Mexico for cattle ranching, water management and distribution, and as a sanctuary for antelope, deer, and bird species.[13]
- The Ho-Chunk Nation of Wisconsin puts to use over 1,500 acres of recently acquired trust land for prairie and bison habitat and preservation of historic and cultural sites, while planning to use other portions of the land for hospital and municipal fire protection services.[14]

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[13] Department of Interior, Press Release, *Secretary Jewell Announces Obama Administration's Largest Land into Trust Acquisition for Tribal Nations* (Jan. 15, 2016), https://www.doi.gov/pressreleases/secretary-jewell-announces-obama-administration%E2%80%99s-largest-land-trust-acquisition; Albuquerque Journal, *90,000 Acres Transferred Into Trust for Isleta Pueblo* (Jan. 15, 2016), https://www.abqjournal.com/707012/90000-acres-put-in-trust-for-isleta-pueblo.html.

[14] Ho-Chunk Nation Land Management Plan, *Former Badger Army Ammunition Plant, Sauk County, WI* (Oct. 2014), https://cswab.org/wp-content/uploads/2014/12/HCN-Land-Plan-Use-Oct.-2014.pdf; Department of the Interior, *Land Acquisition; Ho-Chunk Nation of Wisconsin*, 80 Fed. Reg. 37651 (July 1, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-07-01/pdf/2015-16196.pdf.

4. Energy Development.

Tribal trust lands provide opportunities for conventional energy development and "are also geographically situated to become great producers of renewable energy resources, such as wind, solar and biomass." Opening Statement of Hon. Daniel K. Akaka, U.S. Senator from Hawaii, *Energy Development in Indian Country*, S. Hrg. 112-628, at 1 (Feb. 16, 2012). Energy development on tribal lands "provide[s] an incredible opportunity not only to increase Tribal energy reliability and self-sufficiency but also provide an opportunity for Tribes to contribute to the Nation's energy security goals." S. Hrg. 112-628, at 7. Statement of Tracey A. Lebeau, Director, Office of Indian Energy Policy and Programs, U.S. Department of Energy. As the Department of Interior has explained, "[t]he ability to take land into trust is critical to . . . energy planning and improving energy development capacity." S. Hrg. 112-628, at 7. Statement of Jodi Gillette, Deputy Assistant Secretary, Indian Affairs, U.S. Department of the Interior. For example, "[t]rust acquisitions allow tribes to grant certain rights of way and enter into leases that are necessary for tribes to negotiate the use and sale of their natural resources." S. Hrg. 112-628, at 19

- The Moapa Southern Pauite Solar Energy Center Project is the first utility-scale solar development operating on tribal trust land and is located on the Moapa River Indian Reservation in Nevada. The project provides renewable energy to Los Angeles residents and generates enough solar energy to power approxi-

mately 111,000 homes, offsetting approximately 341,000 metric tons of carbon dioxide annually.[15]

- The White Earth Band of Ojibwe in northern Minnesota operates two 750 kilowatt wind turbines on trust land on the tribe's reservation in northwest Minnesota.[16] The tribe also plans to build a biomass-based heat and power facility to offset fuel oil and propane costs and reduce emissions.[17]

5. Retail and Other Commercial Projects.

Various other kinds of commercial projects made possible by trust lands inject capital and provide services in underserved tribal communities, increase tribal employment opportunities, and frequently benefit surrounding communities as well.

- The Salt River Prima-Maricopa Indian Community utilized trust lands to build the Salt River Fields at Talking Stick, a professional baseball stadium near Phoenix, which serves as the spring-training facility for the Arizona

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[15] *First Solar, Moapa Southern Paiute Solar Project*, http://www.firstsolar.com/Resources/Projects/Moapa-Southern-Paiute-Solar-Park; *Secretary Jewell Approves Utility-Scale Solar Project on Tribal Land in Nevada*, Press Release (Sept. 15, 2016), https://www.doi.gov/pressreleases/secretary-jewell-approves-utility-scale-solar-project-tribal-land-nevada.

[16] Statement of Hon. Al Franken, U.S. Senator From Minnesota, *Energy Development in Indian Country*, S. Hrg. 112-628, at 4-5 (Feb. 16, 2012).

[17] S. Hrg. 112-628, at 4.

Diamondbacks and the Colorado Rockies.[18] It includes an 11,000-seat capacity stadium, which serves the surrounding community as a high-end venue for events and festivals.

- The Gila River Indian Community utilizes tribal land in Chandler, Arizona for the Phoenix Premium Outlets, which feature ninety stores, including high-end retailers.[19]

II. LEGAL UNCERTAINTY AND LACK OF FINALITY IN THE TRUST ACQUISITION PROCESS ARE SIGNIFICANT IMPEDIMENTS TO THE ABILITY OF TRIBES AND INVESTORS TO PUT TRUST LANDS TO THEIR MOST PRODUCTIVE USE.

This Court's decisions in *Carcieri* and *Patchak I*, which corrected certain previously-held understandings of the legal underpinnings of the trust acquisition process, injected a new degree of substantive and procedural uncertainty into that process. Such legal uncertainty can pose a significant obstacle to tribes who require acquisition of trust lands to promote economic development and strengthen tribal self-government, as discussed above, as well as to the

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[18] *Welcome to Salt River Fields*, Salt River Fields at Talking Stick, http://saltriverfields.com/welcome-to-salt-river-fields/ (last visited Sept. 14, 2017); *Salt River Fields at Talking Stick*, Salt River Prima-Maricopa Indian Community, https://www.srpmic-nsn.gov/economic/springtraining/ (last visited Sept. 14, 2017).

[19] *Phoenix Premium Outlets*, Chandler Arizona, http://www.visitchandler.com/shopping/premium-outlets/ (last visited Sept. 14, 2017); *"Premium Outlets" Featuring 90 Stores, Opens in Chandler (w/ video)*, East Valley Tribune (Apr. 4, 2013), http://www.eastvalleytribune.com/money/premium-outlets-featuring-stores-opens-in-chandler-w-video/article_54c3d71c-9c00-11e2-a846-0019bb2963f4.html.

tribal and non-tribal investors who supply the capital necessary to make these projects a reality. In both decisions, this Court noted that Congress was free to address these perceived challenges. As explained below, the Gun Lake Act was drafted and enacted in 2014 against the backdrop of significant judicial and legislative developments highlighting problems with lack of certainty and finality, amidst intensifying calls for these issues to be addressed by Congress.

A. Access to Capital, Which Is Critical to Tribal Economic Development, Is Diminished by Instability.

Inadequate access to capital is among the most significant impediments to tribal economic development. Access to capital dictates the amount of economic success a tribe can realistically expect, given the challenges of growing businesses on previously undeveloped land that is often rural and relatively isolated.

Capital is needed not only for private enterprise, but also "for the large investments that make the operation of a modern tribal government possible. They, their subdivisions, and related public service entities (such as housing authorities or tribal utilities) must be able to fund the construction of government buildings, health clinics, schools, housing, roads, jails, water and sewer systems, electricity grids, telecommunications networks, recreational spaces, and more." Native Nations Institute, *Access to Capital and Credit in Native Communities*, at 61 (May 12, 2016), nni.arizona.edu/.../files/.../Accessing_Capital_and_Credit_in_Native_Communities.pdf

Questions regarding the validity of transactions taking land into trust, particularly where those ques-

tions linger for years after title is transferred, create uncertainty that diminishes the availability of capital to tribes. Indeed, the Government Accountability Office has raised this very concern in testimony before Congress—that "[l]and in [t]rust [i]ssues [m]ay [c]reate [u]ncertainty" that threatens to suffocate economic development and activity. Anu K. Mittal, Director of Natural Resources and Environment, U.S. Government Accountability Office, House of Representatives Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, *Indian Issues: Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands*, GAO-11-543T, at 5..

B. Congress Was Well Aware of the New Wave of Litigation That Was Threatening to Destabilize the Trust Acquisition Process.

1. Litigation Following *Carcieri* Introduced Substantive Uncertainty into the Process.

In *Carcieri*, this Court ruled that the Secretary of the Interior may take land into trust for tribes recently recognized by the Federal Government only if the trust acquisition has been authorized by legislation other than the IRA or the tribe can demonstrate that it was "under Federal jurisdiction" as of 1934. Although such a holding would potentially require many tribes, as part of the trust acquisition process, to engage in a difficult, fact-intensive historical analysis, this Court noted that the issue was one of statutory construction and thus squarely left in the lap of Congress: "Had Congress intended to legislate such a definition [of tribes for whom land can be taken into trust], it could

have done so explicitly . . . . Instead, Congress limited the statute . . . and 'we are obliged to give effect, if possible, to every word Congress used.'" 555 U.S. at 392, quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). As Justice Stevens observed to government counsel during oral argument, if "we disagree with your interpretation and Congress thinks we are wrong they can pass another one of these 15, 16 provisions that they have that says this tribe is . . . recognized now." *Carcieri v. Kempthorne*, No. 07-526, Oral Arg. Tr. at 53:3-6 (Nov. 3, 2008).

As anticipated, the years immediately following *Carcieri* witnessed a new wave of litigation challenging trust acquisitions,[20] as well as repeated calls for Congress to "fix" the uncertainty with new legislation. As the Assistant Secretary of Indian Affairs for the Department of the Interior testified: "Without [a legislative] fix by Congress, *Carcieri* presents a potential problem for any tribe by allowing opponents to mire routine trust applications in protracted and unnecessary litigation." U.S. Senate Committee on Indian Affairs, *Carcieri*: Bringing Certainty to Trust Land Acquisitions (Nov. 20, 2013), at 11. He explained that the *Carcieri* decision was generating "costly and complex litigation over whether applicant tribes were under federal jurisdiction in 1934." *Id.* at 12. Indeed,

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[20] *See, e.g.*, *The Confederated Tribes of the Grand Ronde Cmty. of Oregon v. Jewell*, No. 14-5326, 2016 WL 4056092 (D.C. Cir. July 29, 2016); *Central New York Fair Business Ass'n v. Jewell*, No. 6:08-CV-0660, 2015 WL 1400384 (N.D.N.Y. Mar. 26, 2015); *No Casino in Plymouth and Citizens Equal Rights Alliance v. Jewell*, 136 F. Supp. 3d 1166 (E.D. Cal. 2015); *Cty. of Amador v. Jewell*, 136 F. Supp. 3d 1193 (E.D. Cal. 2015); *Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016).

he told the Senate Committee, "we are up to our eyeballs in litigation on these matters." *Id.* at 13.

The Gun Lake Act's legislative history echoes the concerns expressed in that testimony and reflects Congress' awareness that "there ha[d] been an uptick in frivolous suits against tribal lands" between 2009 and 2014, and that "unless and until we have a *Carcieri*-fix legislation enacted, these types of piecemeal bills will become routinely needed to protect tribal lands that are rightfully held in trust." 160 Cong. Rec. H7485 (2014). *See also* Congressional Research Service, *Carcieri v. Salazar*: The Secretary of the Interior May Not Acquire Trust Land for the Narragansett Indian Tribe Under 25 U.S.C. Section 465 Because That Statute Applies to Tribes "Under Federal Jurisdiction" in 1934, at 18-22 (Aug. 23, 2016) ("CRS") (documenting cases pending as of 2014).

2. Litigation Following *Patchak I* Introduced an Additional Layer of Procedural Uncertainty into the Process by Undermining Finality of Land Transactions.

In 2011, this Court's decision in *Patchak I* introduced procedural uncertainty into the trust acquisition process by "refuting a long-held assumption that U.S. sovereign immunity under the Quiet Title Act barred challenges to any decision of the Secretary to take land into trust once title has passed by the United States." CRS, *supra*, at 1.

The invitation to Congress that was implicit in *Carcieri* was made explicit in *Patchak I*, where the Court observed: "According to the Government, allowing challenges to the Secretary's trust acquisitions would 'pose significant barriers to tribes[']. . . ability

to promote investment and economic development on the lands.' . . . . That argument is not without force, but it must be addressed to Congress." 567 U.S. at 223.

As the Congressional Research Service subsequently recognized, the result in *Patchak I* would "encourage more suits seeking to set aside [Interior] decisions to take land into trust for Indian tribes," as such suits were no longer cut off by the United States' sovereign immunity the moment title transferred to the government, but could now be utilized by opponents of tribal projects to unsettle land transactions that had long since passed. CRS, at 1.

The litigation in *Big Lagoon Rancheria* illustrates the extent to which litigants attempted to re-open past land transfers, thus undermining the ability to ensure finality and repose in trust acquisitions. In that case, the Bureau of Indian Affairs had acquired in trust an eleven-acre parcel for Big Lagoon Rancheria in 1994. The State of California filed a timely but unsuccessful challenge to that trust acquisition. 789 F.3d at 951. The Big Lagoon Rancheria subsequently sued California under the Indian Gaming Regulatory Act ("IGRA"), claiming that the state had failed to negotiate its gaming compact in good faith. *Id.* at 951-52.

The district court found in favor of the tribe, but was reversed in June 2014 by a Ninth Circuit panel. Relying on a combination of *Carcieri* and *Patchak I*, the panel ruled that it was permissible for the State to raise a retroactive, collateral attack on the validity of the trust acquisition that had closed two decades earlier, on the ground that the tribe had not been under federal jurisdiction in 1934. *Id.* at 952 n.5. This

was the law of the Ninth Circuit at the time the Gun Lake Act was signed into law.

The Ninth Circuit later granted rehearing *en banc*, vacating the panel opinion and, in 2015, issuing a new opinion affirming the district court.[21] But the 2014 panel decision, by opening the door to retroactive collateral challenges, was emblematic of concerns being expressed at the time about the resurgence of litigation that had been prompted by *Carcieri* and *Patchak I*—concerns that were resounding in the halls of Congress as the Gun Lake bill was under consideration. The cost of the Big Lagoon Rancheria litigation and others like it,[22] and the uncertainty and lack of finality that the parties encountered, were precisely the frustrations identified in the Department of the Interior's testimony before the Senate Committee on Indian Affairs in late 2013—the same Committee that sponsored the Gun Lake Act: *See* Testimony of Kevin Washburn, at 12, "[T]he *Carcieri* decision, combined

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[21] Sitting *en banc*, the Ninth Circuit held that the State's claim challenging the validity of a trust acquisition—premised on the allegation that the tribe had not been "under federal jurisdiction" in 1934—could not be raised as a collateral attack in the context of a separate dispute under IGRA. Instead, any challenge to the BIA's fee-to-trust decision from 1994 could be brought only under the APA, which has a six-year statute of limitations. *Id.* at 953-54.

[22] The Poarch Band of Creek Indians, for example, brought suit to enjoin a tax audit conducted by Escambia County, Alabama, concerning the validity of a trust acquisition that had occurred decades earlier. *See Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 938 (11th Cir. 2016). The district court granted that injunction, and the Eleventh Circuit affirmed, ruling that parties must bring challenges to trust-land acquisitions under the APA (and within the appropriate statute of limitations), rather than as a collateral challenge. *Id.* at 943-44.

with the *Patchak* decision, casts a dark cloud of uncertainty on land acquisitions for tribes under the Indian Reorganization Act, and ultimately inhibits and discourages the productive use of tribal trust land itself." .

3. Congress Has Considered a Variety of Options to Address the Uncertainty Introduced by the Wave of Litigation Following the *Carcieri* and *Patchak I* Decisions.

As then-Judge Gorsuch once observed in the context of a longstanding Indian reservation and jurisdictional boundary dispute that seemingly defied resolution, at a certain point one must conclude that "'[t]he time has come...to respect the peace and repose promised by settled decisions.'" *Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton*, 835 F.3d 1255, 1260 (10th Cir. 2016), *cert. dismissed*, 137 S. Ct. 2328 (2017), quoting *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1013 (10th Cir. 2015). In the context of the trust-acquisition program, Congress has similarly recognized the value of respecting settled decisions. In response to the offers extended by this Court in *Carcieri* and *Patchak I* to "fix" the instability that has been injected into the process, numerous pieces of legislation have been proposed and debated.[23]

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[23] The 113th Congress, for example, introduced H.R. 279 and H.R. 666/S.2.188, which would have amended the IRA to define, retroactively, the term "Indian" to mean "any federally recognized Indian tribe," regardless of whether such tribe was under federal jurisdiction as of 1934. Similarly, the 114th Congress introduced S. 1879, S. 732/H.R. 407, and H.R. 249, which would have amended the IRA to define "Indian" to mean "all persons of

To date, Congress has not had the votes necessary to pass an across-the-board solution. Instead, as it has done numerous times in the past,[24] Congress has reverted to *ad hoc* legislation to ensure certainty and finality for particular tracts of land for specific tribes. The Gun Lake Act is just one such example, among several, in which Congress has sought to restore "peace and repose," *Ute Indian Tribe*, 835 F.3d at 1260, with respect to Indian land tenure on a case-by-case basis.[25]

Indian descent who are members of any federally recognized Indian tribe . . . ."

[24] *See, e.g.*, Navajo and Hopi Indian Relocation Amendments Act of 190, 25 U.S.C. § 640d-9, enacted July 8, 1980 (declaring that certain lands would be held in trust for the benefit of the Navajo and Hopi tribes); 102 Stat. 1594/Pub. L. 100-425, enacted on Sept. 9, 1988 (holding land in trust for the use and benefit of the Confederated Tribes of the Grand Ronde Community of Oregon); 25 U.S.C. § 1300j-5, Pub. L. 103-323, enacted Sept. 21, 1994 (specifically defining land held by the Pokagon Band of Potawatomi Indians as trust land).

[25] *See, e.g.*, 126 Stat. 257/Pub. L. 112-97, enacted on Feb. 27, 2012 (placing into trust 510 acres for the benefit of the Quileute Indian Tribe); 128 Stat. 2122/Pub. Law 113-232, enacted on Dec. 16, 2014 (providing for an exchange of land to resolve land disputes created by the realignment of the Blackfoot River along the boundary of the Fort Hall Indian Reservation); Nevada Native Nations Land Act, 130 Stat. 958/Pub. Law 114-232, enacted on Oct. 7, 2016 (placing into trust 82 acres for the Shoshone-Paiute Tribes, 941 acres for the Summit Lake Paiute Tribe, 13,434 acres for the Reno-Sparks Lake Paiute Tribe, and 31,269 acres for Duckwater Shoshone Tribe).

III. THE GUN LAKE ACT SHOULD BE CONSTRUED AS ACCEPTANCE BY CONGRESS OF THIS COURT'S OFFER TO RECTIFY THE UNCERTAINTY AND LACK OF FINALITY INJECTED INTO THE TRUST ACQUISITION PROCESS BY *CARCIERI* AND *PATCHAK I*.

With the Gun Lake Act, Congress simply affirmed the trust status of, and restored the sovereign immunity of the United States with respect to, one particular parcel of land for one specific Indian tribe. It did so to ensure finality and certainty for the Gun Lake Tribe and its ability to pursue further economic development of the Bradley Property. In leveraging the legislative process to counter uncertainty created by this Court's decisions, and at the invitation of this Court to do so, Congress acted well within its authority.

The simplest reading of the Gun Lake Act—an affirmation of trust status and restoration of United States sovereign immunity—is, in fact, consistent with this Court's instructions to construe statutes in their full context, so as to avoid raising difficult questions of constitutional law. In *Yates v. United States*, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015), for example, this Court construed the definition of a particular term within the Sarbanes-Oxley Act by taking into account the political and legal context for the statute and the definition of the term at issue. In doing so, the Court relied on a basic principal of statutory construction: "Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words. Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by references to the language itself, [but as well by] the specific context in which the

language is used, and the broader context of the statute as a whole.'" *Id.* at 1081-82, quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). It also is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993) (citations omitted).

In *Bond v. United States*, 134 S. Ct. 2077, 2090, 189 L.Ed.2d 1, (2014), this Court again emphasized the need to engage in a full contextual analysis of statutory text, in holding that a statute imposing criminal penalties did not apply to an altercation between acquaintances, and thus that it did not need to evaluate the parties' claims regarding the Tenth Amendment and international treaties. The Court noted the particular importance of contextual interpretation in a situation, like the instant case, that also implicates the canon of constitutional avoidance: the premise that this Court should construe statutes so as to avoid raising—and therefore deciding—difficult questions of constitutional law.

This Court similarly should read the Gun Lake Act in full context, against the backdrop of contemporary developments in the trust-acquisition program that were capturing the attention of the relevant congressional committees at the time. In doing so, this Court should reach the same conclusion as the D.C. Circuit—that the Gun Lake Act is a constitutional use of Congress' power to assure finality and certainty with respect to a parcel of land held in trust for tribal economic development.

CONCLUSION

The undersigned amicus respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

JOHN DOSSETT
JACOB SCHELLINGER
NATIONAL CONGRESS OF AMERICAN INDIANS
Embassy of Tribal Nations
1516 P St., N.W.
Washington, D.C. 20005
(202) 466-7767
john_dossett@ncai.org

ETHAN G. SHENKMAN
Counsel of Record
R. STANTON JONES
EMILY N. DILLINGHAM
JONATHAN L. KOENIG
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 942-5000
ethan.shenkman@apks.com

Counsel for Amicus Curiae

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